93-987 (1)

Supreme Court, U.S.
FILED
DEC 20 1993
OFFICE OF THE CLERK

No. 93-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

EDWARD C. McREADY
Petitioner,

v.

RICHARD C. BREEDEN, Chairman, Securities and Exchange Commission, *et. al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Edward C. McReady
4 Primrose Street
Chevy Chase, MD 20815
(301) 986-8653

Petitioner Pro Se

December 20, 1993

MM pp

QUESTION PRESENTED

In *United States* v. *Fausto*, 484 U.S. 439, 108 S.Ct. 668 (1988), this Court held that, where a statute, such as the Civil Service Reform Act of 1978 ("CSRA") amending the Civil Service Act of 1966 ("CSA"), does not contain an express statement barring preexisting statutory judicial remedies, those remedies continue to exist unless: (1) congressional intent to preclude said remedies can be "fairly discerned;" and, (2) such congressional intent can be reconciled with the express language of the earlier statute prescribing the remedies. *Fausto*, 484 U.S. at 443-55, 108 S.Ct. at 671-77.

Furthermore, the Whistleblower Protection Act of 1989 ("WPA"), an amendment to the 1978 CSRA, provides that the administrative and conditional judicial remedies prescribed in the CSRA/WPA, for the investigation into, and correction of, "prohibited personnel practices," as defined in the CSRA/WPA, were not "to be construed to limit any right or remedy available under a provision of statute which is outside of" the CSRA/WPA prescribed rights and remedies. 103 Stat. 31, codified at 5 U.S.C. §1222.

The question presented is whether the 1978 CSRA bars preexisting rights of judicial review under the Administrative Procedure Act by federal district courts, as provided by the Federal Question Statute, over alleged wrongful agency action where such agency action results from a violation of regulations promulgated under federal employment statutes (*viz.* the CSA, CSRA, and WPA) which neither prescribe nor preclude an unconditional right to judicial review.

LIST OF PARTIES

The appellant in the case below, Edward C. McReady ("McReady") is the petitioner herein. McReady was the plaintiff in the District Court action from which the appeal was taken.

The appellees in the case below are the respondents herein and include:

1. The Securities and Exchange Commission ("SEC");
2. Richard C. Breeden in his official capacity as the SEC's Chairman and chief operating official;
3. The Office of Personnel Management ("OPM");
4. Constance Berry Newman in her official capacity as OPM's Director and chief operating official;
5. The Office of Special Counsel ("OSC"); and,
6. Mary Wieseman in her official capacity as OSC's Special Counsel and chief operating official.

TABLE OF CONTENTS

JUDGMENT BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

The CSA Regulations Violated 5

CSRA/WPA Administrative And Conditional Judicial Remedies Sought By Petitioner And Disposition 8

APA Judicial Review Sought By Petitioner And Disposition 13

REASONS FOR GRANTING THE WRIT 17

Fausto 19

WPA Section 1222 25

CONCLUSION 32

QUESTION PRESENTED i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

APPENDIX

TABLE OF AUTHORITIES

CASES:	Page
Abbott Laboratories v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)	20, 25
Ardestani v. *I.N.S.*, 112 S.Ct. 515, 116 L.Ed. 2d 496	28, 31
Borrell v. *USICA*, 682 F.2d 981 (D.C. Cir. 1982)	16, 18, 19, 30, 31
Carducci v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983)	16, 18, 19, 30
Cutts v. *Fowler*, 692 F.2d 138 (D.C. Cir. 1982)	16, 18, 19, 30
Duncan v. *Ramsay*, 727 F.2d 192 (1st Cir. 1984)	30, 31
Etelson v. *OPM*, 684 F.2d 918 (D.C. Cir. 1982)	18, 19
Georgia v. *Pennsylvania R. Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945)	20, 21, 25
Gilley v. *United States*, 649 F.2d 449 (6th Cir. 1981)	30, 31
Harrison v. *Bowen*, 815 F.2d 1505 (D.C. Cir. 1987)	16, 18, 19, 30

TABLE OF AUTHORITIES (cont.)

	Page
CASES (cont.):	
Rivera v. *United States*, 924 F.2d 948 (9th Cir. 1991)	27, 29
Rodriquez v. *United States*, 480 U.S. 522, 107 S.Ct. 1391, 94 L.Ed 2d 533 (1987)	20, 25
United States v. *Fausto*, 484 U.S. 439, 108 S.Ct. 668 (1988)	17, 19, 20, 21, 22, 23, 24, 25, 31
United States v. *M.I.M.*	28, 29, 31
Velis v. *Kardanis*, 949 F.2d 78 (3rd Cir. 1991), *rehearing den.*	28, 31
FEDERAL STATUTES:	
Administrative Procedure Act, Pub.L. No. 89-554, Sept. 6, 1966, 80 Stat. 392, codified as amended at 5 U.S.C. §§701 *et seq.*	3, 4, 13
5 U.S.C. §701	13, 18
5 U.S.C. §702	13
5 U.S.C. §706	14, 15

TABLE OF AUTHORITIES (cont.)

	Page
FEDERAL STATUTES (cont.):	
Civil Service Act of 1966, Pub.L. No. 89-554, Sept. 6, 1966, 80 Stat. 401, codified as amended in scattered sections of 5 U.S.C.	3,
5 U.S.C. §§1302, 3301, and 3302	5
Civil Service Reform Act of 1978, Pub.L. No. 95-454, Oct. 13, 1978, 92 Stat. 1111, codified as amended in scattered sections of 5 U.S.C.	3,
5 U.S.C. §1212	9
5 U.S.C. §1214	9, 10, 11, 12
5 U.S.C. §2302	9, 10, 25
5 U.S.C. §7709	12
Federal Question Statute, Pub.L. No. 94-574, Oct. 21, 1976, 90 Stat. 2721, codified at 28 U.S.C. §1331	4, 15
Whistleblower Protection Act of 1989, Pub.L. 101-12, April 10, 1989, 103 Stat. 16, codified in scattered sections of 5 U.S.C.	3, 4, 26
5 U.S.C. §1222	4, 17, 19, 25, 26, 27, 28, 29, 30, 31

TABLE OF AUTHORITIES (cont.)

	Page
FEDERAL RULES AND REGULATIONS:	
Displaced Employee Program, 5 Code of Federal Regulations, Part 330, Subpart C	5, 7
Federal Personnel Manual, Chapters 330 and 332	5, 6, 7, 8
LEGISLATIVE HISTORY:	
Joint Explanatory Statement, 135 Cong. Rec. at S2784 (daily ed. March 16, 1989)	27, 29

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

EDWARD C. McREADY
Petitioner,

v.

RICHARD C. BREEDEN, Chairman, Securities and Exchange Commission, *et. al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Edward C. McReady ("Petitioner" or "McReady") hereby petitions for a writ of certiorari to review the June 25, 1993 judgment of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in this matter.

JUDGMENT BELOW

The June 25, 1993 judgment of the D.C. Circuit affirming, without opinion, the dismissal of petitioner's complaint is not reported and is reprinted, in pertinent part, in the Appendix ("App.") *infra* at A-1 to A-2. The September 20,

1993 order of the D.C. Circuit denying rehearing is also not reported and is reprinted in the App. *infra* at A-3. In its June 25 judgment, the D.C. Circuit affirmed, in pertinent part, the November 14, 1991 Memorandum Opinion and Order ("Opinion") of the United States District Court for the District of Columbia ("D.C. District Court"). The Opinion is not reported and is reprinted in the App. *infra* at A-4 to A-21.

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). Petitioner seeks review of a decision by the D.C. Circuit affirming, without opinion, the dismissal by the District Court of a claim made by petitioner under federal laws. The D.C. Circuit denied petitioner's appeal on June 25, 1993. Petitioner's request for a rehearing by the D.C. Circuit was denied in an order entered on September 20, 1993. This petition has therefore been timely filed.

STATUTORY PROVISIONS

The pertinent statutory provisions, and related federal regulations, are set in App. *infra* at A-22 to A-35.

STATEMENT OF THE CASE

In his civil complaint, McReady alleged facts showing, *inter alia*, that respondents Securities and Exchange Commission ("SEC") and Office of Personnel Management ("OPM") violated federal regulations promulgated under the Civil Service Act of 1966 ("CSA"), Pub.L. No. 89-554, Sept. 6, 1966, 80 Stat. 401, codified as amended in scattered sections of Title 5 of the United States Code ("U.S.C."), App. *infra* at A-25 to A-26. The CSA itself neither expressly prescribes nor prohibits judicial review of these violations.

However, the alleged acts and omissions of the SEC and OPM in violating these CSA promulgated regulations qualify for both: (1) administrative and conditional judicial remedies prescribed by the Civil Service Reform Act of 1978 ("CSRA"), Pub.L. No. 95-454, Oct. 13, 1978, 92 Stat. 1111, App. *infra* at A-29 to A-35, as amended by the Whistleblower Protection Act of 1989 ("WPA"), Pub.L. No. 101-12, April 10, 1989, 103 Stat. 16, App. *infra* at A-24, which statutes are also codified in scattered sections of Title 5 of the U.S.C.; and, (2)

unconditional judicial review under the Administrative Procedure Act ("APA"), Pub.L. No. 89-554, Sept. 6, 1966, 80 Stat. 392, codified as amended at 5 U.S.C. §§701 *et seq.*, App. *infra* at A-22 to A-23.

Moreover, the WPA, in effect, provides that the aforementioned CSRA/WPA administrative and conditional judicial remedies are not exclusive and thus do not preclude the exercise of "any right or remedy available under a provision of statute which is outside of [the CSRA/WPA]," such as the APA. 5 U.S.C. §1222 ("Section 1222"), App. *infra* at A-24.

In this case, the conditional judicial remedies specified in the CSRA/WPA for the alleged violations of the CSA promulgated regulations were foreclosed by administrative inaction. Consequently, McReady relies on the Federal Question Statute, Pub.L. No. 94-574, Oct. 21, 1976, 90 Stat. 2721, codified at 28 U.S.C. §1331, App. *infra* at A-22, as the jurisdictional basis for the claimed violations, which violations qualify, at the very least, for unconditional judicial review under the APA.

The CSA Regulations Violated

McReady occupied a Staff Accountant position in the competitive service at the Federal Trade Commission ("FTC") from September, 1974 until January 7, 1989, when he was terminated as a result of a reduction-in-force. Shortly after his termination from FTC employment, McReady registered with OPM for the Displaced Employee Program ("DEP"). The DEP is enforced and administered by OPM under federal regulations at 5 CFR Part 330, subpart C, App. *infra* at A-27 to A-28. The DEP regulations are promulgated under, *inter alia*, provisions of the CSA codified in Chapters 13 and 33 of U.S.C. Title V. 5 U.S.C. §§1302, 3301, and 3302, App. *infra* at A-25 to A-26.

Federal regulations governing the DEP provide, in pertinent part, that "... [n]o individual may be selected for ... a vacancy from an OPM or agency competitive register as long as a *qualified DEP registrant* is available." 5 CFR §330.305 (emphasis supplied), App. *infra* at A-28. A "qualified DEP registrant" is defined under formally prescribed federal employment rules as one who is "minimally qualified to perform

the duties of [a] vacant position" by meeting the "*minimum qualifications standards*, and any *selective factors*[1] that are appropriate for the vacant position." Federal Personnel Manual ("FPM") Ch. 330, subch. 3-7b and 3-7e (emphasis supplied).

In June of 1989, McReady was certified as an eligible DEP candidate for a competitive service Staff Accountant position ("subject matter position") in the SEC's Division of Enforcement, the same type of position he had previously held at the FTC. McReady fulfilled all of the "minimum qualifications standards" specified for the subject matter position. Although there were seven "quality ranking factors"[2] identified for the subject matter position, there were no "selective factors." Therefore, since he met the "minimum qualifications standards" for the SEC position, and further, since

---

[1] "A selective factor is a knowledge, skill, or ability that is essential for satisfactory performance on the job and represents an addition to the basic standard for the position." FPM Ch. 332, subch. 4-4a(1).

[2] "A quality ranking factor is a knowledge, skill, or ability which could be expected to significantly enhance performance in a position, but could not reasonably be considered necessary for satisfactory performance." FPM Ch. 332, subch. 4-4b(5).

there were no "selective factors" for the position, McReady was a "qualified" DEP candidate for the position under the foregoing rules and regulations (*i.e.*, 5 CFR §330.305, App. *infra* at A-28, and FPM Ch. 330, subch. 3-7b and 3-7e).

The SEC official responsible for selecting the successful candidate for the subject matter position interviewed McReady in July of 1989. During the interview, the SEC selecting official stated that it was his, and the SEC's, policy to hire only applicants with recent public accounting experience for Staff Accountant positions similar to the subject matter position.

The SEC passed over McReady for the subject matter position and instead selected -- from a competitive register -- a non-DEP candidate with recent public accounting experience. In attempting to justify McReady's nonselection, the SEC stated that McReady failed to satisfy the "quality ranking factors" identified for the position. The use of "quality ranking factors" is, under formally adopted federal employment practices, impermissible for purposes of assessing a candidate's basic eligibility or qualifications for any position in the federal

government.[3] OPM approved the SEC's decision to select a non-DEP candidate, instead of McReady, for the position.

The SEC's selection of a non-DEP candidate, instead of a "qualified" DEP candidate (McReady), violated the DEP and constituted an abrogation of McReady's federal employment rights. As a "qualified" DEP candidate, McReady was entitled to the subject matter position as a matter of law, even if it were somehow determined that the selected non-DEP candidate was more qualified for the position.

CSRA/WPA Administrative And Conditional Judicial Remedies Sought By Petitioner And Disposition

Under provisions of the CSRA/WPA, codified in Chapter 12 of Title V of the U.S.C, the Office of Special Counsel

---

[3] The definition of a "quality ranking factor" is provided in note 2, *supra*. "Quality ranking factors" are to be used only to "identify the better qualified candidates from the total number of basically qualified candidates." FPM, Ch. 332, subch 4-4b(5). In other words, "quality ranking factors" can be used only to rank those candidates who are already deemed to be basically eligible or qualified for the position and thus to determine which of the qualified candidates are better qualified. In essence, the resort to "quality ranking factors" by the SEC to evaluate McReady constituted a tacit admission that McReady met the "minimum qualifications standards" for the subject matter position, and thus, was a "qualified DEP registrant."

("OSC"), an independent federal agency, has authority to investigate and take corrective action on, 11 types of "prohibited personnel practices." 5 U.S.C. §1212 and 1214, App. *infra* at A-29 to A-30. These "prohibited personnel practices" are described and identified in provisions of the CSRA/WPA, codified in Chapter 23 of Title V of the U.S.C. 5 U.S.C. §2302, App. *infra* at A-33 to A-35.

The violations of the CSA promulgated federal regulations, as alleged by petitioner and described in the preceding section, qualify for at least two of the 11 CSRA/WPA "prohibited personnel practices." Specifically, the decision by the SEC and OPM to select a non-DEP candidate for the subject matter position resulted in granting a "... preference or advantage not authorized by law, rule, or regulation to ... [the non-DEP candidate] for the purpose of ... injuring ... [McReady's] prospects ... for employment." 5 U.S.C. §2302(b)(6), App. *infra* at A-34. Moreover, the actions of SEC and OPM officials qualify as statutorily proscribed conduct in that they took and/or failed to take personnel actions -- defined

in 5 U.S.C. §§2302(a)(2)(A)(i) and (vii) to include appointments and reemployments, respectively, to positions in the federal government, App. *infra* at A-33 to A-34 -- whereby the taking and/or failure to take such actions violated laws, rules, or regulations "implementing, or directly concerning, the merit system principles contained in" 5 U.S.C. §2301. *See*, 5 U.S.C. ¶2302(b)(11), App. *infra* at A-35.

With respect to all complaints filed with OSC alleging the commission of "prohibited personnel practices," OSC must "investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." 5 U.S.C. §1214(a)(1)(A), App. *infra* at A-30. In situations involving the two types of "prohibited personnel practices" alleged by McReady in the case at bar, *i.e.*, those covered in Chapter 23 at 5 U.S.C. §2302(b)(6) and (11), App. *infra* at A-34 to A-35, OSC has essentially two courses of action it can take.

First, if, as a result of its investigation, OSC determines that there are no "reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken," OSC can terminate the investigation and take no further corrective action, provided of course, it gives the complaining party a written explanation for its decision. 5 U.S.C. §1214(a)(2)(A), App. *infra* at A-30 to A-31. Secondly, if, as a result of its investigation, OSC determines "there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken," OSC can, in effect, petition the Merit Systems Protection Board ("MSPB") to institute corrective action on behalf of the victim in the event the perpetrator refuses to take the appropriate corrective action. 5 U.S.C. §1214(b)(2)(A) and (B), App. *infra* at A-31 to A-32. Judicial review of any final order or decision of the MSPB made with respect to an OSC petition for corrective action is available in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. §§1214(c), App. *infra* at A-32, and 7703(b), App. *infra* at A-33.

In April of 1990, McReady notified OSC of the facts and circumstances surrounding the SEC's decision, approved by OPM, to pass over his selection as a qualified DEP eligible candidate for the subject matter position and appoint instead a non-DEP candidate. Pursuant to the aforementioned CSRA/WPA administrative review procedures, McReady requested that OSC investigate his charges that, by their conduct in violating the CSA promulgated DEP, the SEC and OPM had engaged in "prohibited personnel practices" proscribed under the CSRA/WPA.

In November of 1991, OSC informed McReady that it was terminating the investigation and would take no corrective action with respect to his administrative complaint. In other words, OSC had decided that it would not petition the MSPB on McReady's behalf to institute a corrective action, thereby precluding any form of judicial review by the Federal Circuit as prescribed under the CSRA/WPA. 5 U.S.C. §§1214(c), App. *infra* at A-32, and 7703(b), App. *infra* at A-33.

APA Judicial Review Sought By Petitioner and Disposition

In pertinent part, the APA affords the right of judicial review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute...," provided that there is no statute precluding judicial review, and further provided that the challenged agency action is not "committed to agency discretion by law." *See*, 5 U.S.C. §§701(a)(1) and (2) and 702, App. *infra* at A-22 to A-23. In the case at bar, McReady satisfies all three of the foregoing APA criteria for judicial review.

First, McReady has alleged facts showing that he suffered "... legal wrong because of agency action, or [was] adversely affected or aggrieved by agency action within the meaning of a relevant statute," *i.e.*, the CSA, in that he was harmed by the SEC's action, approved by OPM, to pass over his selection as a "qualified" DEP candidate for the subject matter position in favor of another person who was a non-DEP candidate. Secondly, although the CSA itself contains no

express grant of jurisdiction to federal district courts over CSA based claims, neither it [the CSA], nor any other statute for that matter, explicitly precludes judicial review over such claims. Finally, the alleged facts demonstrate that the SEC and OPM had no discretion to select a non-DEP candidate for the subject matter position when a "qualified" DEP candidate (McReady) was available, even if the non-DEP candidate were somehow deemed to be more qualified than the DEP candidate (McReady).

The reviewing court under the APA must, *inter alia*, "compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...." 5 U.S.C. §706(1) and (2), App. *infra* at A-23. The facts alleged by McReady show that, as a "qualified" DEP candidate, his selection for the subject matter position was "unlawfully withheld" and the selection of non-DEP candidate was "arbitrary, capricious ... [and] not in accordance with

law...." *Id.* Thus, McReady has established not only that his claim against the SEC and OPM fulfills the conditions for federal court review under the APA but also that, if he proves his alleged facts at trial, he would be entitled to recovery under the APA's scope of review provisions.

In his civil complaint, McReady identified the Federal Question Statute as one basis for district court jurisdiction over his claim that the SEC and OPM had violated the CSA promulgated DEP. The Federal Question Statute provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *See*, 28 U.S.C. §1331, App. *infra* at A-22. Since this is an action arising under laws of the United States, *i.e.*, the CSA and the APA, as detailed in the three preceding paragraphs, the lower district court is accordingly endowed with jurisdiction. The Federal Question Statute, the APA, and the CSA were all enacted well before the CSRA and, in juxtaposition, provided the rights of preexisting judicial review by federal district courts over violations of the CSA

promulgated DEP, as such rights are claimed by McReady in the case at bar.

In its November 14, 1991 Opinion, the D.C. District Court dismissed McReady's CSA promulgated DEP claim against the SEC and OPM, *inter alia*, on the ground that federal district courts have no jurisdiction to review such a claim on a *de novo* basis under either an implied right of action or under the APA. Opinion, App. *infra* at A-14 to A-21, *citing Borrell* v. *USIA*, 682 F.2d 981, 988 (D.C. Cir. 1982); *Cutts* v. *Fowler*, 692 F.2d 138, 140 (D.C. Cir. 1982); *Carducci* v. *Regan*, 714 F.2d 171, 174 (D.C. Cir. 1983); and, *Harrison* v. *Bowen*, 815 F.2d 1505, 1513 (D.C. Cir. 1987). Placing significant reliance on D.C. Circuit's 1983 decision in *Carducci*, the D.C. District Court asserted in the case at bar, "It has been clearly decided ... that the CSRA eliminates any right to judicial review under the APA of action allegedly violative of the CSRA." *Id.*, at A-16. The D.C. Circuit Court concluded that "McReady must rely on the OSC to determine whether the SEC or OPM has violated the CSRA and whether relief is available from the MSPB and the

courts." *Id.*, at A-15. Further, the D.C. District Court held that WPA Section 1222 does not allow for such review. *Id.*, at A-16 to A-17.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit has incorrectly decided a question of considerable practical importance to the federal government -- a question which has not been, but should be, settled by this Court. Moreover, the D.C. Circuit's decision is inconsistent not only with principles enunciated by this Court in *United States* v. *Fausto*, 484 U.S. 439, 108 S.Ct. 668 (1988), but also with the unambiguous statutory language of WPA Section 1222.

There is at least one erroneous conclusion of law implied in the D.C. District Court's assertion that "[i]t has been clearly decided that ... the CSRA eliminates any right to judicial review under the APA of action allegedly violative of the CSRA." Opinion, App. *infra* at A-16. It has never been decided by this Court, or, for that matter, even by the D.C. Circuit, that the CSRA, enacted in 1978, bars preexisting rights of judicial review accorded by the earlier enacted APA over alleged

wrongful agency action where such agency action results from a violation of regulations promulgated under federal employment statutes (*viz.* the CSA, CSRA, and WPA).

None of the cases cited by the D.C. District Court in support of its holding in the case at bar (*Borrell, Cutts, Carducci*, and *Harrison*) dealt with this specific issue. *See, Borrell*, 682 F.2d at 987-88; *Cutts*, 692 F.2d at 139-40; *Carducci*, 714 F.2d at 174-75; and, *Harrison*, 815 F.2d at 1516. More significantly, even the D.C. Circuit has held that the Federal Question Statute accords federal district courts with jurisdiction over CSA claims qualifying for judicial review under the APA. *Etelson* v. *OPM*, 684 F.2d 138 (D.C. Cir. 1982).[4]

---

[4] This D.C. Circuit's three-member panel in *Harrison* mistakenly asserted that "... as the court [in *Carducci* noted, the CSRA] ... had the effect of depriving employees of a right of judicial review under the APA that they probably had prior to enactment of the CSRA." *Harrison*, 815 F.2d at 1513. With all due respect, the *Harrison* panel misstated the *Carducci* holding. All that the *Carducci* court said with respect to the effect of the CSRA on the APA was that agency actions, "*not constituting prohibited personnel practices*, were 'committed to agency discretion by law,' 5 U.S.C. §701(a)(2) (1976)," and

(continued...)

While this Court has never addressed the precise issue presented in the instant case, the principles it enunciated in *Fausto* and the clear statutory language of WPA Section 1222 dictate that issue should be resolved in petitioner's favor.

Fausto

The *Fausto* decision -- rendered well after the D.C. District Court's rulings in *Borrell, Cutts, Carducci,* and *Harrison* but never addressed by the D.C. District Court in this case -- mandates the existence of federal court jurisdiction over the direct review of McReady's CSA promulgated DEP claim against the SEC and OPM. The Supreme Court in *Fausto* held that, where a statute, such as the CSRA, does not contain an express statement barring preexisting statutory judicial remedies,

---

[4](...continued)
therefore, no longer qualify for judicial review under the APA. *Carducci*, 714 F.2d at 175 (emphasis supplied). The *Carducci* court did not hold, as the *Harrison* panel claimed, that agency actions, constituting prohibited personnel practices, no longer qualified for judicial review under the CSRA. Even more significantly, neither the *Carducci, Harrison*, nor any other three-member panel of the D.C. Circuit has ever held that the Federal Question Statute does not accord federal district courts with jurisdiction over CSA claims qualifying for judicial review under the APA, in contradiction of *Etelson*.

those remedies continue to exist unless: (1) congressional intent to preclude said remedies can be "fairly discerned;" and, (2) such congressional intent can be reconciled with the express language of the earlier statute prescribing the remedies. *Fausto*, 484 U.S. at 443-55, 108 S.Ct. at 671-77.

The first of the foregoing determinations is based on the principle of statutory construction that "Congress will be presumed to have intended judicial review of agency action to be available unless there is 'persuasive reason' to believe otherwise." *Id.*, 484 U.S. at 452, 108 S.Ct. at 675, *citing* *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507 (1967). The second of the foregoing determinations is based on the principle of statutory construction that "repeals [of the right to judicial review] by implication are strongly disfavored, [*Rodriquez* v. *United States*, 480 U.S. 522, 524, 107 S.Ct. 1391 (1987)], so that a later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two, ... [*Georgia* v. *Penn. R. Co.*, 324

U.S. 439, 456-457, 65 S.Ct. 716 (1945)]." *Id.*, 484 U.S. at 452-53, 108 S.Ct. at 676.

In the case at bar, there is no "fairly discerned" congressional intent in the CSRA to preclude the preexisting remedies allowing for district court judicial review of McReady's CSA promulgated DEP claim against the SEC and OPM. In *Fausto*, this Court examined the various classes of civil service employees and found that, before the CSRA, veterans and members of the competitive service, such as McReady, were accorded far more statutory judicial remedies for adverse personnel actions than members in other classes of federal service, including nonveterans and employees in the excepted service. *Fausto*, 484 U.S. at 443-49, 108 U.S. at 671-74. This disparity continued after the enactment of the CSRA. *Id.* Since this Court in *Fausto* discerned a congressional intent underlying the CSRA, and its predecessor CSA, to afford greater judicial remedies to veterans and members of the competitive service, there is no basis for barring these classes of

employees from preexisting statutorily prescribed judicial remedies.

Moreover, even if such a congressional intent could be "fairly discerned," the rule of statutory construction disfavoring repeals by implication would present an insurmountable obstacle to the abolishment of the preexisting rights of APA judicial review by federal district courts under the Federal Question Statute over McReady's CSA promulgated DEP claim. In other words, courts would not be able to reconcile an ostensible CSRA congressional intent to deny competitive service federal employees their preexisting statutory rights of judicial review by federal district courts with the language of the APA and the Federal Question Statute.

This Court's decision in *Fausto* was limited in application solely to a resolution of the rights of a nonpreference eligible employee in the excepted service to seek judicial review of a personnel action under the Back Pay Act ("BPA"), codified at 5 U.S.C. §5596, a statute which, like the APA and the Federal Question Statute, predated the CSRA. In *Fausto*, this

Court reconciled the explicit language of the BPA to the congressional intent underlying the CSRA and held only that a nonpreference eligible employee in the excepted service is precluded under the terms of both statutes from seeking judicial review of a personnel action giving rise to a back pay claim. *Fausto*, 484 U.S. at 443-55, 108 S.Ct. 671-77.

Unlike the BPA which was the focus in *Fausto*, the APA and the Federal Question Statute upon which district court jurisdiction rests in the case at bar leave no room for reconciliation with an ostensible CSRA congressional intent to deny competitive service federal employees their preexisting statutory rights of judicial review. As previously demonstrated, McReady's CSA promulgated DEP claim qualifies for judicial review under the APA and such judicial review reposes in the federal district courts under the Federal Question Statute. *See*, this petition, *supra*, at 12-16.

In stark contrast to the APA and the Federal Question Statute, the language in the BPA makes no reference to a federal employee's right to judicial review by a federal court but only to

entitlement to back pay if it is "found by *appropriate authority under applicable law* ... [that the employee was] affected by an ... unwarranted personnel action...." 5 U.S.C. §5596(b)(1) (emphasis supplied). This Court's conclusion that, in the future (*i.e.*, post-CSRA), an action under the BPA can be brought in a federal court only after it is first determined by an "appropriate authority under applicable law" that an employee has undergone an unwarranted personnel action, *Fausto*, 484 U.S. at 452-55, 108 S.Ct. at 675-77, has no application to the APA and the Federal Question Statute. In other words, the APA and the Federal Question Statute, when read together, do not condition judicial review upon an adverse finding by an "appropriate authority under applicable law," as the BPA does. *Id.*

Accordingly, the D.C. District Court was wrong when it held, in effect, that federal district courts do not have jurisdiction under the APA and the Federal Question Statute to review McReady's CSA promulgated DEP claim because such a decision is inconsistent not only with this Court's decision in *Fausto* but with sound principles of statutory construction

enunciated in earlier Supreme Court cases endorsed by the *Fausto* court, *viz.*, *Abbott Lab.*, *Rodriquez*, and *Penn. R. Co.*, *supra*.

WPA Section 1222

If this Court should somehow decide that its earlier decision in *Fausto* is consistent with the D.C. District Court's decision to dismiss McReady's CSA promulgated claim, WPA Section 1222 nonetheless dictates that said claim qualifies for APA judicial review by federal district courts under the Federal Question Statute.

As previously stated, WPA Section 1222 provides, in pertinent part, that the administrative and conditional judicial remedies available in Chapter 12 of the CSRA/WPA for the investigation, and correction of, CSRA/WPA Chapter 23 "prohibited personnel practices" by OSC -- including the Section 2302(b)(1)(B), (b)(6), and (b)(11), App. *infra* at A-34 to A-35, "prohibited personnel practices" alleged by McReady in the instant case -- is not to "be construed to limit any right or remedy available under a provision of statute which is outside of

both ... chapter [12] and chapter 23." 103 Stat. 31, WPA Section 1222, App. *infra* at A-24. WPA Section 1222 means exactly what it says and what Congress intended, *i.e.*, OSC does not have "exclusive" jurisdiction over the *de novo* review of CSA or CSRA violations, particularly in instances where, as here, judicial review is prescribed by another statute, such as the APA.

Even the D.C. District Court admitted that Section 1222 appeared "on its face to indicate that the CSRA no longer preempts review [of McReady's claim] under the APA." Opinion, App. at A-16 to A-17. This interpretation of WPA Section 1222 is completely consistent with other provisions in the 1989 WPA. For instance, the purpose of the 1989 WPA is stated at the outset as follows: "(t)o amend title 5, United States Code [and] *to strengthen the protections available to [f]ederal employees against prohibited personnel practices....*" *See*, WPA, 103 Stat. 16 (emphasis supplied), App. *infra* at A-24. Section 1222, particularly when read in conjunction with the foregoing purpose clause, shows that Congress clearly intended

that the procedures set forth under CSRA/WPA Chapter 12 were not meant to be the exclusive remedies for violations of CSRA/WPA Chapter 23.

Notwithstanding its admission that Section 1222 appeared "on its face to indicate that the CSRA no longer preempts review [of McReady's claim] under the APA," *see*, Opinion, App. *infra* at A-16 to A-17, the D.C. District Court decided that Section 1222 does not in fact allow for such review. In so holding, the lower court relied solely on one statement in the WPA legislative history -- that statement being: "Section 1222 is not intended to create a cause of action where none otherwise exists or to reverse any court decision." *Id., citing,* Joint Explanatory Statement ("JES"), 135 Cong. Rec. at S2784 (daily ed. 3/16/89). Further, the D.C. District Court cited the 9th Circuit's decision in *Rivera* v. *U.S.*, 924 F.2d 948 (9th Cir. 1991), where the court there also relied solely on the foregoing statement in the WPA's legislative history to hold that Section 1222 does not permit district court review of a CSA claim. *Id.*

There are several reasons why the D.C. District Court erred in its interpretation of WPA Section 1222. First and foremost, it was improper for the D.C. District Court to even resort to legislative history to interpret the statutory language at issue. Courts have universally held that, where, as here, statutory language is unambiguous, it is not necessary, and often improper, to turn to legislative history for its interpretation. *See, e.g., Velis* v. *Kardanis*, 949 F.2d 78, 81 (3rd Cir. 1991), *rehearing den.* (Since statutory interpretation properly begins with the language of the statute itself, "[t]here is no need to resort to legislative history unless the statutory language is ambiguous"); *Ardestani* v. *I.N.S.*, 112 S.Ct. 515, 520 (Strong presumption that plain language of statute expresses congressional intent is rebutted only in rare and exceptional circumstances). Moreover, since the statement in the legislative history of the 1989 WPA, upon which the D.C. District Court placed its utter reliance, is inconsistent with the unequivocal language of the statute, this statement should be disregarded as a matter of law. *See, United States* v. *M.I.M.*, 932 F.2d 1016,

1020 (1st Cir. 1991) ("Where alleged 'intent' expressed in legislative report is in direct conflict with apparent intent as manifested in words of statute themselves, we must surely apply the statute rather than the report; after all, it is the statute, not the report, that was enacted by Congress"). For these same reasons, the D.C. District Court's reliance on the 9th Circuit's *Rivera* decision is misplaced.

Even if it were determined that WPA Section 1222 is not clear on its face, it was wrong for the D.C. District Court to rely solely on one statement in the WPA legislative history since there are several conflicting statements which clearly support a different interpretation. *See, e.g.*, JES at 135 Cong. Rec. at S2782 and 2784 ("... [WPA] seeks to eliminate ... impediments which have made it unduly difficult for .... victims of prohibited personnel practices to win redress. *One category of impediments has been a series of [MSPB] and federal court decisions. [WPA's] provisions ... modify or overturn inappropriate administrative or judicial decisions.* *** [S]ection 1222 provides that the network of rights and remedies created

under ... [CSRA] is not meant to limit any right or remedy which might be available under any other statute. *** [S]ection 1222 says it is *not* the intent of Congress that the procedures under chapters 12 and 23 ... are meant to provide *exclusive* remedies.") (emphasis supplied).

Moreover, the D.C. District Court erred in relying on the at-issue statement because of the inherent inconsistencies for the inference which it drew from the statement -- that inference being that WPA Section 1222 was not intended to reverse earlier court decisions denying preexisting rights of judicial review for CSA and CSRA violations. The D.C. District Court has construed the at-issue statement to mean that its interpretations of *Borrell, Cutts, Carducci,* and *Harrison* are unaffected by the 1989 WPA. The D.C. District Court failed to consider that there were other pre-WPA court decisions holding that the CSRA did not preclude preexisting rights of judicial review for CSA and CSRA violations. *See, e.g., Gilley* v. *U. S.*, 649 F.2d 449, 453 (6th Cir. 1981); *Duncan* v. *Ramsay*, 727 F.2d 192, 195 (1st Cir. 1984).

There is nothing in WPA's legislative history to show whether, when it said, "Section 1222 is not intended ... to reverse *any* court decision," JES, 135 Cong. Rec. at S2784 (emphasis supplied), Congress was referring to the *Borrell, et al.* decisions or to decisions like the 6th Circuit's in *Gilley* and the 1st Circuit's in *Duncan*. Thus, the at-issue statement can only be construed to mean that Congress simply was not going to address the merits of "*any*" pre-1989 WPA case dealing with CSRA's effect on preexisting rights of judicial review.

Clearly then, Section 1222, like this Court's decision in *Fausto*, must be viewed as allowing for federal district court jurisdiction over claims similar to McReady's CSA promulgated DEP claim under the APA and the Federal Question Statute. The D.C. District Court's attempt to read an interpretation into Section 1222 that is inconsistent with its unequivocal language violates sound principles of statutory construction endorsed by this Court in *Ardestani* and by the 3rd Circuit in *Velis* and the 7th Circuit in *M.I.M.*

CONCLUSION

On the basis of the foregoing, this petition should be granted since it involves a question which has not been, but should be settled by this Court, and further since, the challenged lower court decisions are inconsistent both with this Court's earlier rulings and unambiguous statutory language. Contrary to the lower court's determinations in this matter, the 1978 CSRA does not bar preexisting rights of judicial review under the APA by federal district courts, as provided by the Federal Question Statute, over petitioner's CSA promulgated DEP claim against respondents SEC and OPM.

Respectfully submitted,

EDWARD C. McREADY
Petitioner Pro Se
4 Primrose Street
Chevy Chase, MD 20815
(301) 986-8653

APPENDIX

INDEX TO APPENDIX

1. Judgment of the United States Court of Appeals for the District of Columbia Circuit Affirming the United States District Court for the District of Columbia A-1

2. Order Denying Petition For Rehearing A-3

3. Memorandum Opinion And Order by United States District Court for the District of Columbia Dismissing Complaint A-4

4. Federal Question Statute, Pub.L. No. 94-574, Oct. 21, 1976, 90 Stat. 2721, codified at 28 U.S.C. §1331 ..... A-22

5. Administrative Procedure Act, Pub.L. No. 89-554, Sept. 6, 1966, 80 Stat. 392, codified as amended at 5 U.S.C. §§701 *et seq.* A-22

6. Whistleblower Protection Act of 1989, Pub.L. 101-12, April 10, 1989, 103 Stat. 16, codified in scattered sections of 5 U.S.C. A-24

7. Civil Service Act of 1966, Pub.L. No. 89-554, Sept. 6, 1966, 80 Stat. 401, codified as amended in scattered sections of 5 U.S.C. A-25

8. Displaced Employee Program, 5 Code of Federal Regulations, Part 330, Subpart C A-27

9. Civil Service Reform Act of 1978, Pub.L. No. 95-454, Oct. 13, 1978, 92 Stat. 1111, codified as amended in scattered sections of 5 U.S.C. A-29

United States Court of Appeals
For the District of Columbia Circuit

No. 92-5053 **September Term, 1992**
90cv00335

Edward C. McReady,

Appellant

v.

Richard C. Breeden, Chairman,
SEC, et al.

FILED JUN 25 1993
RON GARVIN
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Mikva, Chief Judge; Wald and Ruth B. Ginsburg, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for an opinion. See D.C. Cir. Rule 14(c). It is

ORDERED AND ADJUDGED that the district court's order dismissing appellant's claims under the Civil Service Reform Act ("CSRA") be affirmed substantially for the reasons

stated by the district court in its memorandum opinion and order filed November 14, 1991. ***

***

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

United States Court of Appeals
For the District of Columbia Circuit

No. 92-5053 **September Term, 1992**
90cv00335

Edward C. McReady,

Appellant

v.

FILED SEP 20 1993

Richard C. Breeden, Chairman, SEC, et al.

RON GARVIN
CLERK

BEFORE: Mikva, Chief Judge; Wald, Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing filed August 6, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:

Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD C. MCREADY Plaintiff, v. RICHARD C. BREEDEN, et al., Defendants	**FILED** **NOV 14 1991** **CLERK, U.S. DISTRICT** **COURT, DISTRICT** **OF COLUMBIA** Civil Action No. 90-0335 (JHG)

MEMORANDUM OPINION AND ORDER

Plaintiff, Edward C. McReady ("McReady"), filed his original complaint in this pro se action against Richard C. Breeden ("Breeden") as Chairman of the Securities and Exchange Commission ("SEC"), the SEC, Constance Berry Newman ("Newman") as Director of the Office of Personnel Management ("OPM"), and the OPM on February 14, 1990. McReady claimed that certain acts and omissions of the defendants violated employment rights guaranteed by the Civil Service Reform Act ("CSRA"), Pub.L. No 95-454, 92 Stat. 1111, codified as amended in scattered sections of 5 U.S.C.,

and other rights guaranteed by the Age Discrimination Employment Act ("ADEA"), codified as 29 U.S.C. §§ 621 et seq. On April 19, 1990, defendants moved to dismiss the action under Federal Rule of Civil Procedure 12(b) for lack of subject matter jurisdiction and for failure to state a claim for which relief could be granted. McReady filed his opposition to the motion on May 4, 1990. After numerous filings including a motion to stay the proceedings, McReady filed an amended complaint on February 19, 1991, adding the Office of Special Counsel ("OSC") as a defendant and further alleging that the OSC had unreasonably delayed investigating McReady's administrative petition, which complained of the actions of the previously named defendants at issue in this case. Subsequently, defendants moved to dismiss the amended complaint, McReady filed his opposition to the motion, and defendants filed their reply. For reasons stated below, defendants' motion is granted and this case is dismissed.

BACKGROUND

Mr. McReady worked as a grade 14 Staff Accountant for the Federal Trade Commission ("FTC") from September, 1974 until January 7, 1989 when he was terminated as a result of a reduction-in-force ("RIF"). Shortly after his termination, McReady registered with defendant OPM for the Displaced Employee Program ("DEP"), administered by the OPM pursuant to the provisions of 5 C.F.R. Part 330, Subpart C. Pursuant to federal rules and regulations, "no individual may be selected for ... a vacancy from an OPM or agency competitive register as long as a qualified DEP registrant is available." 5 C.F.R. § 330.305. According to formally adopted federal employment practices, a qualified DEP registrant is one who is "minimally qualified to perform the duties of [a] vacant position" by meeting the "minimum qualification standards, and any selective factors that are appropriate for the vacant position." Federal Personnel Manual ("F.P.M.") Ch. 330, subch. 3-7(b) and 3-7(e).

Sometime in mid-1989, a Staff Accountant position opened in SEC's Division of Enforcement. The SEC issued an announcement that the position was vacant and declared that applications for the position could be submitted during the nine day period beginning July 5, 1989 and ending on July 14, 1989. On June 30, 1989, OPM certified McReady as a DEP eligible candidate for the position and referred him to the SEC's Delegated Examining Officer, Edith Hocutt ("Hocutt"). Hocutt referred McReady as a DEP eligible candidate to Edward G. Noakes ("Noakes"), the Acting Chief Accountant for the SEC's Division of Enforcement and the SEC selecting official responsible for recommending which applicant should be appointed to the Staff Accountant position.

McReady claims that the SEC's vacancy announcement listed three required qualifications for the position. The first qualification was a bachelor's degree with a major in accounting or an acceptable substitute. The second requirement was at least three years of professional accounting/auditing experience involving the preparation or review of financial statements

prepared in accordance with generally accepted accounting principles and subject to the application of generally accepted auditing standards and procedures. The final requirement was at least one year of professional experience at a level of difficulty and responsibility comparable to the next lower grade level in the federal service. McReady alleges that he met all three requirements.

In addition to the "qualifications required," McReady asserts that the vacancy announcement listed several "Quality Ranking Factors" to be considered in the hiring decision and provided applicants with a four page narrative sheet in which they could describe how their employment experiences satisfied each of the factors. According to McReady's complaint, the announcement advised, "Applications will first be evaluated against the QUALIFICATIONS REQUIRED. Applications meeting the basic and professional requirements will then be evaluated against the QUALITY RANKING FACTORS. Your score will be determined by the information provided on the application and narrative sheets." McReady's Amended

Complaint for Damages and Declaratory and Injunctive Relief ("Amended Complaint") at 9. McReady claims that under federal employment practices and procedures, "quality ranking factors" cannot be considered for purposes of determining whether a candidate is basically qualified for a vacant position because such factors "simply identify the better qualified candidates from the total number of basically qualified candidates." Id. citing F.P.M. Ch. 332, subch. 4-4(b)(5).

Noakes contacted McReady on July 20, 1989 to inquire whether McReady was interested in being considered for the Staff Accountant position. By that time, Noakes had already interviewed the candidate who ultimately was given the position. McReady interviewed for the position on July 23, 1989 at which time Noakes informed McReady that it was his and the SEC's policy to hire only applicants with recent public accounting experience for Staff Accountant positions. Noakes decided not to offer McReady the position and, in a memorandum dated July 24, 1989, listed the bases for his decision. On August 2, 1989, after review of Noakes' reasons, Hocutt sustained the decision

not to offer the position to McReady. McReady was then 46 years old. McReady alleges that the person selected for the position was a non-DEP registrant and was younger than he.

On September 9, 1989, McReady received formal notice of the SEC's decision to pass over his selection in an undated letter signed by Hocutt. Hocutt advised McReady that he could request the SEC's Director of Personnel to reconsider Noakes' decision, and he did so in a letter dated September 25, 1989. On October 20, 1989, William E. Ford, the SEC's Deputy Director of Personnel, affirmed Noakes' decision. McReady appealed Ford's decision to George G. Kundahl, the SEC's Executive Director, in a letter dated October 30, 1989. On November 20, 1989, Kundahl sent a letter to McReady affirming the decisions of Ford, Hocutt, and Noakes. Accompanying the letter were a copy of Noakes' July 24, 1989 memorandum stating the bases for passing over McReady and a copy of Hocutt's findings regarding the sufficiency of Noakes' reasons. McReady alleges that this was the first time he was provided with those documents.

In correspondence dated December 4, 1989, McReady appealed the decisions of the SEC agents to William Irvin, Assistant Director of OPM's Washington Examining Services. McReady claims that on February 6, 1990, Irvin informed him that the OPM had affirmed the decisions made at the SEC. On April 30, 1990, more than one month after McReady filed his complaint and eleven days after the defendants filed their motion to dismiss, McReady notified the OSC of the facts and circumstances surrounding the decisions of the SEC and the OPM and requested that the OSC investigate his charges that the SEC and OPM engaged in prohibited personnel practices proscribed by the CSRA. McReady alleges that as of January 31, 1991, the OSC has failed to take appropriate corrective actions required by the CSRA.

On April 25, 1990, also more than one month after McReady filed this action, McReady mailed to the Equal Employment Opportunity Commission ("EEOC") a notice of intent to bring legal action against the SEC and the OPM for violation of the ADEA. In letters dated May 10, 1990, the

EEOC informed the SEC and the OPM of McReady's intent, even though they had already been served with copies of McReady's complaint alleging that they violated provisions of the ADEA.

McReady's amended complaint contains two counts; one claims violations of the ADEA and the other claims violations of the CSRA. For reasons stated below, both counts are dismissed.

DISCUSSION

In viewing a motion to dismiss, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). At this stage, the Court must accept as true the factual allegations of the complaint, Hishon v. King & Spalding, 467 U.S. 69, 73 (1984), and draw from them all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

1. The ADEA-Based Count

***

2. The CSRA and APA-Based Count

Mr. McReady claims that the acts and omission of defendants SEC and OPM in passing over his selection as a qualified DEP candidate for the Staff Accountant position constituted prohibited personnel practices under 5 U.S.C. § 2303(b) and violated employment rights protected by CSRA at 5 U.S.C. §§ 1302, 3301, and 3302, Executive Order 10577, 5 C.F.R. Part 330, Subpart C, and F.P.M. Ch. 330, subch. 3-7(b), (e). He further asserts that the OCS failed to thoroughly and expeditiously investigate his charges that the SEC engaged in prohibited personnel practices and to take appropriate corrective action, as contemplated in the CSRA at 5 U.S.C. §§ 1202 et seq. and 2302. He also contends that this Court has jurisdiction to review the actions of the SEC and the OPM de novo pursuant to an implied private right of action created in the CSRA or under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq. McReady further alleges that, under the

CSRA, this Court has jurisdiction to review the actions taken by the OSC and, if merited, issue an injunction or mandamus compelling the OSC to conduct a proper inquiry into alleged violations undertaken by the SEC or the OPM. McReady's assertions are rejected.

Mr. McReady does not cite, nor can he, any provision in the CSRA, the regulations, or the Federal Personnel Manual which explicitly grants him the right to United States District Court review of his pass-over by the SEC and of the OPM's affirmation of his pass-over.[1] In addition, it is well-settled that a plaintiff cannot seek District Court review of an alleged violation of the CSRA by relying upon an implied private right of action. This Circuit has stated, "we cannot accept ... arguments in support of an implied right of action under the

---

[1] Although McReady could have obtained the Staff Accountant position had the OPM not sustained the SEC's decision, see 5 C.F.R. § 330.307(c), and although McReady was entitled to copies of the SEC's reasons for passing him over and OPM's bases for affirmance of the SEC decision, see F.P.M. Ch. 332, subch. 4, § 4-8(g), the CSRA does not expressly provide for review of the SEC or OPM decisions in United States District Court.

CSRA. We think Congress meant to establish the OSC as an exclusive avenue of relief to probationary employees alleging prohibited personnel practices under the CSRA." Borrell v. United States Int'l Communications Agency, 682 F.2d 981, 988 (D.C. Cir. 1982). Although McReady is not a "probationary employee," the holding of Borrell is equally applicable in this case. As this Circuit held,

> Although Congress enacted CSRA to safeguard all federal employees from prohibited personnel practices, the Act contains a detailed enforcement scheme to enforce its purpose. That scheme provides relief for certain actions ... only through an employee petition to the [OSC] for an investigation and a corrective action. It is for the OSC to determine, in the first instance, whether a prohibited personnel practice has occurred and whether to seek correction from the MSPB and the courts.

Cutts v. Fowler, 692 F.2d 138, 140 (D.C. Cir. 1982). Like the plaintiff in Cutts, McReady must rely on the OSC to determine whether the SEC or OPM has violated the CSRA and whether relief is available from the MSPB and the courts. See 5 U.S.C. §§ 1214, 1215.

In the alternative, McReady argues that District Court review is available under the APA. Specifically, McReady

alleges that he is entitled to judicial review under 5 U.S.C. § 702 which provides, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof." It has been clearly decided, however, that the CSRA eliminates any right to judicial review under the APA of action allegedly violative of the CSRA. Were it otherwise, "the exhaustive remedial scheme of the CSRA would be impermissibly frustrated." Carducci v. Regan, 714 F.2d 171, 174 (D.C. Cir. 1983). See also Harrison v. Bowen, 815 F.2d 1505, 1513 (D.C. Cir. 1987) (The CSRA "had the effect of depriving employees of a right of judicial review under the APA that they probably had prior to enactment of the CSRA.").

McReady argues that 5 U.S.C. §1222, enacted after Carducci and Harrison, overturns those decisions and allows him to seek judicial review under the APA. Section 1222 states that, with certain limited exceptions, nothing in Chapter 23 of the CSRA, the chapter under which McReady seeks relief, "shall be construed to limit any right or remedy available under

a provision of statute which is outside [of the CSRA]."

Although the § 1222 may appear on its face to indicate that the CSRA no longer preempts review under the APA, the legislative history of §1222 clearly indicates that Congress did not intend to modify the holding of Carducci and Harrison. See Rivera v. United States, 924 F.2d 938, 954 (9th Cir. 1991). As Rivera emphasizes, the Joint Explanatory Statement of §1222 instructs, "Section 1222 is not intended to create a cause of action where none otherwise exists or to reverse any court decision." Id. citing 135 Cong.Rec. S2784 (daily ed. March 16, 1989). Therefore, the only review of the alleged violations of the CSRA available to McReady is still that outlined by Carducci.

After holding that the CSRA extinguished any right of review under the APA of actions allegedly in violation of the CSRA, the Carducci court clarified the scope of available review of agency actions challenged under the CSRA. The Carducci court summarized:

> (1) for major personnel actions specified in the statute ("adverse actions"), direct judicial review after extensive prior administrative proceedings; (2) for specified minor personnel actions infected by particularly heinous

motivations or disregard of law ("prohibited personnel practice"), review by the Office of Special Counsel, with judicial scrutiny limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry." and (3) for specified minor personnel actions not so infected, and for all other minor personnel actions, review by neither OSC nor the courts.

Carducci at 175 (citations omitted). The actions at issue in this case do not rise to the level of "adverse actions" as defined in the CSRA. See 5 U.S.C. § 7512.[2] Accordingly, this Court does not have jurisdiction to review directly the actions of the SEC or the OPM. McReady does allege that the SEC and the OPM engaged in "prohibited personnel practices" as defined by 5 U.S.C. §2302(b) and, therefore, limited judicial review of the OSC's alleged failure to investigate McReady's claim is available. For reasons stated below, however, such review is not available in this Court.

Under the scheme laid out by the CSRA, the OSC acts as a prosecutor who investigates alleged violations and brings actions before the Merit Systems Protection Board ("MSPB").

---

[2] The five "adverse actions" are: (1) removal; (2) suspension for more than 14 days; (3) reduction in grade; (4) reduction in pay; and (5) furlough of 30 days or less.

See 5 U.S.C. §§ 1214, 1215. See also Barnhart v. Devine, 771 F.2d 1515, 1525 (D.C. Cir. 1985). With few exceptions,[3] final decisions of the MSPB may be reviewed only in the United States Court of Appeals for the Federal Circuit. See 5 U.S.C. §7703. Because the Court has dismissed McReady's ADEA claim, it would not have jurisdiction to review any future decision of the MSPB relating to the SEC's decision to pass-over McReady.

This Circuit has stated that where a District Court "has no present or future jurisdiction over agency actions assigned by statute or appellate court review, it can contemplate no exercise of jurisdiction that mandamus might aid." Telecommunications Research and Action Center v. Federal Communications Commission, 750 F.2d 70, 77 (D.C. Cir. 1984). In TRAC, the Court of Appeals denied District Court jurisdiction to issue a mandamus compelling the FCC to expedite a ratemaking

---

[3] The exceptions are claims of discrimination prohibited by section 717(c) of the Civil Rights Act of 1964, section 15(c) of the Age Discrimination in Employment Act of 1967, and section 16(b) of the Fair Labor Standards Act of 1938, as amended. 5 U.S.C. §7703(b).

decision, noting that judicial review of final FCC actions, is vested exclusively in the Court of Appeals.[4] Though the TRAC case involved final FCC actions, and although the District of Columbia Circuit has not had the opportunity to rule on the mandamus issue in the context of an alleged failure of the OSC to investigate or prosecute a claim under the CSRA, this circuit has indicated that the holding of TRAC might apply to a CSRA case brought before a District Court seeking review of the OSC action. See Barnhart at 1524 n. 15.[5] Because this Court does not have jurisdiction to review a final determination of the MSPB as to whether the SEC or OPM violated the CSRA, and in consideration of TRAC, this Court does not have jurisdiction

---

[4] The plaintiffs in TRAC alleged District Court jurisdiction to issue the mandamus under the All Writs Act, 28 U.S.C. § 1651(a) and the mandamus statute, 28 U.S.C. § 1361.

[5] Barnhart stated, "We need not here plumb the procedural depth of whether, under the particular statutory structure of the CSRA and the Classification Act, mandamus jurisdiction would lie with the District Court pursuant to the Mandamus Act, 28 U.S.C. § 1361 (1982), or with the Federal Circuit pursuant to the Federal Court Improvement Act, 5 U.S.C. § 7701(b)(1) (1982). See Telecommunications Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984)."

to review the OSC's alleged failure to act. Consequently, Count 1 of McReady's complaint brought under the CSRA and the APA is dismissed for lack of jurisdiction.

Accordingly, it is hereby

ORDERED the Defendants' motion to dismiss for lack of subject matter jurisdiction is granted.

IT IS SO ORDERED.

November 14, 1991.

Joyce Hens Green
United States District Judge

FEDERAL QUESTION STATUTE

TITLE 28, U.S.C.

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

ADMINISTRATIVE PROCEDURE ACT

TITLE 5, U.S.C.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that --

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

***

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the

meaning of a relevant statute, is entitled to judicial review thereof. ***

***

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

***

WHISTLEBLOWER PROTECTION ACT

Public Law 101-12
101st Congress

An Act

To amend title 5, United States Code, to strengthen the protections available to Federal employees against prohibited personnel practices, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Whistleblower Protection Act of 1989."

***

"§ 1222. Availability of other remedies

"..., [N]othing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23."

CIVIL SERVICE ACT OF 1966, AS AMENDED

TITLE 5, U.S.C.

CHAPTER 13 - SPECIAL AUTHORITY

§ 1302. Regulations

(a) The Office of Personnel Management, subject to the rules prescribed by the President under this title for the administration of the competitive service, shall prescribe regulations for, control, supervise, and preserve the records of, examinations for the competitive service.

***

CHAPTER 33 – EXAMINATION, SELECTION, AND PLACEMENT

§ 3301. Civil service; generally

The President may --

(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;

(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

(3) appoint an prescribe the duties of individuals to make inquiries for the purpose of this section.

§ 3302. Competitive service; rules

The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for --

(1) necessary exceptions of positions from the competitive service; and

(2) necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, 7203, 7321, and 7322 of this title.

Each officer and individual employed in an agency to which the rules apply shall aid in carrying out the rules.

DISPLACED EMPLOYEE PROGRAM

5 CODE OF FEDERAL REGULATIONS

PART 330 – RECRUITMENT, SELECTION, AND PLACEMENT (GENERAL)

***

Subpart C – Placement Assistance Programs for Displaced Employees

Authority 5 U.S.C. 1302, 3301, 3302 ....

§ 330.301 Coverage.

This subpart covers placement programs for employees who will be displaced or have been separated from their Federal jobs as a result of agency work force reductions.... ***

§ 330.302 OPM programs.

(a) OPM operates two placement programs -- the Interagency Placement Assistance Program (IPAP) and the Displaced Employee Program (DEP). *** The DEP provides assistance to employees who have received a specific notice of separation or who have been separated.

***

§ 330.305 Placement assistance.

(a) ... DEP registrants are referred ahead of other candidates when they are qualified and available for vacancies expected to last more than 1 year and that are filled through competitive registers held by OPM or by an agency with delegated examining authority. *** No individual may be selected for such a vacancy from an OPM or agency competitive register as long as a qualified DEP registrant is available. ***

CIVIL SERVICE REFORM ACT OF 1978, AS AMENDED

CHAPTER 12, TITLE 5, U.S.C.

SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

***

§ 1212. Powers and functions of the Office of Special Counsel

(a) The Office of Special Counsel shall --

(1) in accordance with section 1214(a) and other applicable provisions of this subchapter, protect employee, former employees, and applicants for employment from prohibited personnel practices;

(2) receive and investigate allegations of prohibited personnel practices, and, where appropriate --

(A) bring petitions for stays, and petitions for corrective action, under section 1214; ***

***

§ 1214. Investigations of prohibited personnel practices; corrective action

(a)(1)(A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

***

(2)(A) If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of --

(i) the termination of the investigation;

(ii) a summary of relevant facts ascertained by the Special Counsel,

including the facts that support, and

the facts that do not support, the allegations of such person; and

(iii) the reasons for terminating the investigation.

***

(b)(2)(A) If in connection with any investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report

recommendations for corrective action to be taken.

(B) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action. ***

***

(c)(1) Judicial review of any final order or decision of the Board under this section may be obtained by any employee, former employee, or applicant for employment adversely affected by such order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

***

CHAPTER 77, TITLE 5, U.S.C.

§ 7703. Judicial review of decisions of the Merit Systems Protections Board

***

(b)(1) ... [A] petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board. ***

CHAPTER 23, TITLE 5, U.S.C.

CHAPTER 23 -- MERIT SYSTEM PRINCIPLES

§ 2303. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section --

(A) "personnel action" means --

(i) an appointment;

***

(vii) a reemployment;

***

***

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority --

***

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment:

***

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

***